to have been vacant, as I have said, from 15th March. But there may be a difference between Mr. Gilpin's authority before the 19th of last month, and Mr. O'Neill's present, or occasional future authority. The existence of such a difference depends upon the question, whether Mr. Gilpin was, until the latter day, the incumbent *in fact*, though not *of right*. Mr. O'Neill cannot, through any future exercise of such authority as he now has, become the incumbent *in fact*, if he is not the incumbent *of right*. His relations with the officers of the court will be thus understood. His occasional authority will be recognised as resting on this footing only, however he may describe it. There will be no implied acquiescence in his own definition of its character. Unless the definition is impliedly concurrent, such acquiescence cannot be inferred. What I have said will prevent any inference of tacit acquiescence from acts of the officers.

The word *happen* imports contingency total or partial, absolute or qualified. In Law Rep. 3 C. P. 316, WILLES, J., in view of an absolute contingency, said: "An *accident* is not the same as an *occurrence*, but is something that *happens* out of the ordinary course of things." In the case of an office whose term is of limited duration, the term expires in the ordinary course of events. But when it thus expires, the Senate may or may not be in session. Upon this qualified contingency depends the question whether the vacancy *happens* during a recess. The words of the Constitution are "may happen," which perhaps import contingency more strongly than if the word *may* had not been used.

Circuit Court of the United States, Northern District of New York.—In Equity.

CHARLES H. MEAD, ASSIGNEE IN BANKRUPTCY OF EDWIN P. RUSSELL, PORTER TREMAIN, AND AUGUSTUS TREMAIN, *v.* THE NATIONAL BANK OF FAYETTEVILLE, AND EDWIN P. RUSSELL, PORTER TREMAIN, AND AUGUSTUS TREMAIN.

A creditor of a partnership firm holding notes both of the firm and of the individual partners for a firm-debt, is entitled to prove in bankruptcy his claims on the firm-note against the joint estate, and on the individual notes against the separate estates of the makers.

By the English practice, such a creditor must *elect* which estate he will prove against, but whether such a rule is proper under our Bankrupt Law, *dubitatur*.

HALL, J.—The defendants, Edwin P. Russell, Porter Tremain

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[1] We are indebted for this case to Hon. N. K. HALL.—EDS. AM. L. R.

and Augustus Tremain, were adjudged bankrupts on the 6th of January, 1868; and plaintiff was appointed their assignee. These defendants had been copartners in business, and on the 5th of December, 1866, were indebted to the other defendant (the bank) in the sum of about $43,000. This indebtedness was evidenced by sundry notes of the firm, as maker; and each of these notes of the firm bore the indorsement of one of the copartners;—Porter Tremain being such indorser for $13,500, Augustus Tremain for $12,000, and Edwin P. Russell for $17,500. On the day last named, and for reasons not deemed necessary to be determined or discussed, the form of the paper which evidenced such indebtedness was changed upon the application of the officers of the bank, and the firm notes were taken for $14,000, the notes of Porter Tremain for $10,000, those of Augustus Tremain for $9000, and those of Edwin P. Russell for $10,000. The notes made by the firm were indorsed by Edwin P. Russell, and those made by one of the individual partners, were respectively indorsed by the other two members of the firm. These notes were all given for the previously existing copartnership debt, and they were afterwards renewed by like notes and like indorsements; all the original and renewed notes and indorsements being in fact securities for debts which were the proper debts of the copartnership.

After the adjudication in bankruptcy, the bank being then the holder and owner of the paper thus given in renewal, proved its debts as against the makers alone; that is against the firm and joint estate upon the firm note of $14,000, and against the individual members of the firm and their separate estates, upon the notes signed by each partner respectively; but did not prove any demand against the separate estates of the copartners upon such indorsements.

There being assets in the hands of the plaintiff belonging to the joint estate of the bankrupts, as such copartners, and also assets belonging to the separate estates of the several individual members of the firm; and the relative amount of those assets being such that the bank would receive a much larger dividend, if allowed to take a dividend upon its debt or debts as thus proved—partly against the firm and partly against the partners individually—the plaintiff, as assignee, filed his bill in this court, and now insists that the whole debt of the bank, being in equity

and in fact the debt of the firm, must be proved as a debt against, and take a dividend from, only the joint estate of the bankrupts; and that no part of it can be paid out of the separate or individual estates of the bankrupts, in consequence of their individual liability, either as makers or indorsers.

It is impossible for me, at this time, to give this case the careful examination and deliberate consideration its importance deserves, without neglecting other cases having equal claims to an early decision. The counsel who argued the case had, as they said, been unable to find any decision under the Act of 1841 which determined this question; and my own limited research has brought under my observation but a single case (*Farnum's*, post) in which this question appears to have been decided. In respect to the firm, whatever may have been the legal relations between the bank and the individual partners (see *Babcock's Case*, 3 Story's Rep. 393, 398, and 399), these individual partners, in respect to the notes made or indorsed by them in their individual names, were accommodation makers or indorsers for the benefit of the firm; and the firm, as between the partners and in equity, must be considered as the principal and primary debtor.

As between the bank and these individual partners, the making or indorsing of these notes created a legal obligation against the individual partner who thus made or indorsed those notes, and the bank might sue upon and enforce such obligation according to its form and terms. It therefore had its election to sue either the maker or the indorser; and it might, if it chose, have maintained separate suits against the maker and each indorser, and taken a judgment against each. In short, the bank, when these notes were dishonored, was the legal creditor of the several parties thereto, according to the form of their several and respective obligations; and there is no reason for holding that the legal relation of debtor and creditor thus subsisting did not exist under the Bankrupt Act: *Babcock's Case*, *ubi supra*.

The Act of 1867, § 36, contains, in reference to bankrupt partners, the same provisions in substance as the Act of 1841, § 14; and these provisions have been said to be in accordance with the rule as previously established. (See *Marwick's Case*, before Judge WARE, Dav. 229; *Collins & Son* v. *Hood*, 4 McLean's Reports 186, 188; *Ingall's Case*, 5 Boston Law Reporter 401.)

These provisions of our statute do not, in terms, prohibit the bank, which had taken the precaution to require the note of the copartnership to be indorsed by the members of that copartnership in their individual names, before giving credit upon it, from proving their debts and taking dividends against the joint and separate estates of these debtors, in virtue of their joint and several liabilities respectively; for the bank was clearly a legal creditor of the individual partners in respect to the notes upon which their individual names appeared, either as makers or indorsers; but the English Court of Chancery (in the absence, it is said, of any statutory provision on the subject) has, it seems, established the doctrine that in cases of bankruptcy a creditor having *knowingly* taken both the copartnership and individual obligation of his debtors for the same debt, must elect whether he will prove his debt against the joint estate or the separate estate of his debtors: Collyer on Partnership, §§ 940–948; Avery & Hobbs's Bankrupt Law 308; Lindley's Law of Partnership (Phila. Law Library), pp. 1013–1025.

This doctrine of election necessarily concedes that the creditor is a creditor of the firm, and likewise of the separate partners whose individual liability he has taken the precaution to exact; and is therefore an authority sustaining the claim of the bank in this case, that they are the creditors of the individual partners upon the notes signed or indorsed by them individually.

The reasonable doctrine that the mere form of the security or evidence of indebtedness does not control in respect to the question whether the debt can be proved against the copartnership, or must be proved against the separate estate of a partner, seems also to be well established in England. See cases referred to by Avery & Hobbs, pp. 309, 310, 311. See also *Agawam Bank* v. *Morris*, 4 Cush. 99.

Thus, when a firm borrowed money for partnership purposes, and only one of the partners gave a bond for its payment, the other being a witness to it and the money being entered on the cash-book of the firm, it was held that the debt therefor might be proved as a joint debt: *Ex parte Brown*, 1 Atkins 225; *Ex parte Emly*, 1 Rose 61.

In this case it is probable that the bank at its election would have a right to prove its whole debt against the copartnership estate only, if the rules established by the English Court of

Chancery were adopted; but it is not necessary now to decide whether the bank has such right to prove against the joint estate, or whether it has a right to prove against the firm upon the firm-note, and against the indorsers thereon,—and against the general makers and indorsers of the note not signed in the firm-name,—according to the legal liability of each,—for the bank has not, as yet, insisted upon a right to prove its debts except as against the makers of the several notes which evidence the indebtedness.

Looking to the questions actually presented in this case, I am of the opinion that the bank had a right to prove its debts against the makers of the notes held by it, and is entitled to dividends from the joint and separate estates of the bankrupts, according to such proof. The utmost that can be claimed against the bank is, that it may be driven to its election; and as it has proved its debts against the makers of the notes, and them alone, no valid objection has been urged against such proof.

It may perhaps be doubtful, whether the bank is compelled to elect according to the English practice in bankruptcy. In the case of *Farnum*, 6 Boston Law Rep. 21, already referred to, the learned judge of the Massachusetts district held, that under the Bankrupt Act of 1841, a creditor who presented a bill of exchange drawn by the firm and indorsed by one of the partners, was entitled to a dividend from the joint estate of the firm, and also a dividend from the separate estate of the partner who made such indorsement; and he repudiated the English rule which required an election by the creditor under like circumstances. The question seems to have been carefully considered by Judge SPRAGUE, and I confess I regard the rule adopted as more reasonable than that of the English courts; but if I did not, I should be unwilling to disregard a decision, directly in point, made by that able judge, without very careful and deliberate consideration. The English rule has been disapproved by some of the most eminent judges and ablest lawyers of England; and Judge SPRAGUE, in the case alluded to, declared that the right of a party holding two valid obligations, to the benefit of both, was founded both in law and justice; and that he did not think himself authorized to set aside that right on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognised in this country. This English rule was condemned by Judge STORY, in Story on Part., § 376, *et seq.;* and in *Borden* v.

Cuyler, 10 Cush. Rep. 478. Judge CUSHING, in delivering the opinion of the court, declared that it remained a mooted question in the United States, and that in Massachusetts the practice and the weight of professional opinion favored the double proof, but that the point had not then been adjudicated. Nor was it adjudicated in that case, or in any other case in our own courts that has fallen under my observation, except in the case of *Farnum* already noticed; and upon the authority of Judge SPRAGUE'S decision, and the best consideration I have been able to give to the question presented, I am of the opinion that the bank had, at least, a right to prove its debts and claim dividends in the manner stated in the bill.

It is not, perhaps, necessary now to consider whether the creditors of the individual partners, or rather the assignee as the representative, is not in equity entitled to require that the joint estate shall be deemed a debtor to the assignee as such representative, to the extent of any payments which may be made upon the debt of the bank out of the separate estates of the individual partners, in the same manner that any other party who had made or indorsed similar notes for the accommodation of the firm might have done; and that whether the English doctrine of election is or is not to prevail. The bill states that the assets of the firm, though nominally amounting to about $50,000, are really worth much less; that the individual assets of the partners over and above encumbrances are about as follows:—Russell's $7000; Porter Tremain's $11,000; and Augustus Tremain's about $3000. The amount of the debts (other than those of the bank) proved against the firm and against the several individual partners is not stated; but the firm was insolvent and bankrupt. It is alleged that Russell individually owed debts amounting to about $900, while the two other partners owed no individual debts likely to be proved against individual estates; but I see no statement of the firm or individual debts proved, either in the bill or in the testimony in the case, other than the debts held and proved by the bank.

At all events the question just suggested has not been argued, and a final disposition of it might require a settlement of the accounts of the individual partners with the firm; and as the case decided by Judge SPRAGUE, and the intimation made in the 10th Cushing had not been called to the attention of the counsel

and were not discussed by them, I think it better not to make any decree in this case at present, but to advise the counsel that in my opinion the bank has a right to dividends against the joint and separate estates of the bankrupts, according to their proofs in the case as heretofore stated; and that any other question in the case may be further argued.

Further research by the counsel or myself may lead to the discovery of other cases, decided under the Act of 1841, bearing upon the main question; but I am not able at this time to pursue the investigation.

United States District Court. District of New Jersey.

IN RE WARREN C. ABBE.[1]

Where a member of a late copartnership files his individual petition under the Bankrupt Act, and inserts in his schedules debts contracted by said copartnership, and there are no copartnership assets to be administered, he will be entitled to be discharged from all his debts, individual as well as copartnership.

It is not necessary, in such a case, to make the other partners parties to the proceedings, or to have them brought in under General Order No. 18.

The cases of *William H. Little*, Bankrupt Register 74, and of *Alexander Frear*, Id. 201, commented upon.

THE following case and opinion were certified by the Register, W. S. JOHNSON.

The bankrupt first petitions, using the form prescribed for partnership petitions (Form 2). In this petition he sets himself out as a member of "a copartnership lately composed of himself and one Henry C. Read, of Philadelphia." The petition then proceeds in the usual form for partners, alleging inability to pay debts, &c., and closes by praying that the said firm may be declared bankrupts, &c. It also contains the allegation that Abbe has been unable to get his "late copartner, Henry C. Read, to join in this petition." The petition is signed and sworn to by Warren C. Abbe alone. To this petition is attached a schedule showing debts to the amount of $2456, all of which are stated to have been "contracted as copartner with Henry C. Read, of the late firm of Read & Abbe." The schedules show that there are no partnership assets. Then follows an individual petition (Form

[1] We are indebted for this case to the *Bankrupt Register*.—EDS. AM. L. R.